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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 237

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

EDYTH LE GIERSE and BANKERS TRUST COMPANY, as Executors of the Estate of Cecile Le Gierse, Deceased,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

Opinions Below

The opinion of the Board of Tax Appeals (R. 9-17) is reported in 39 B.T.A. 1134. The opinion of the Circuit Court of Appeals (R. 40-42) is reported in 110 F. (2d) 734.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 13, 1940 (R. 43). The petition for a writ of certiorari was filed July 12, 1940, and was granted October 14, 1940 (R. 43). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Is the estate tax exemption granted to insurance proceeds by Section 302(g) of the Revenue Act of 1926, as amended, to be denied to the proceeds of a standard form life insurance policy merely because a separate annuity contract was issued as a condition precedent to the issuance of the policy?

Statute and Regulations Involved

The pertinent statutory provisions and regulations will be found in the Appendix, *infra*, pp. 27-34.

Statement of the Case

The findings of fact by the Board of Tax Appeals appear in the Record, pp. 10-16. In contrast to the summary of the facts stated by the Petitioner in his brief (pp. 3-5), the following summary of such findings of fact is submitted.

On December 6, 1935, Cecile Le Gierse, a resident of New York, took out a single premium life insurance policy in the principal sum of $25,000 upon her own life, naming her daughter, Edyth Le Gierse, as the beneficiary. The policy was in the standard form and included all the provisions ordinarily contained in any single premium life insurance policy. The single premium paid for the policy was $22,946. On the same date, the decedent purchased from the same insurance company a single premium life annuity also in the standard form for annuity contracts. The premium for the annuity was $4,179 and entitled the decedent to receive $49.15 per month or $589.80 per year during the remainder of her life (R. 11, 12, 13). The decedent was eighty years of age at the time she entered into these contracts with the insurance company. She was in normal health for a person of that age and at such time had an expectancy under the American Experience Tables of about four or five years (R. 10, 15). No physical examination was required of the decedent by the insurance company prior to the issuance of the insurance policy (R. 13).

The decedent did not enter into these contracts in contemplation of death (R. 16). The main reason therefor was her desire to conserve the principal of her estate and to prevent further shrinkage in a particular part of it, the proceeds from which she used to purchase the two contracts in question. The estate tax situation did, however, come up between the decedent and the life insurance agent (R. 13, 14).

The insurance policy would not have been issued to the decedent without the issuance of the annuity. The annuity, however, would have been issued to the decedent without the issuance of the life insurance policy. In computing the single premium charged for the life insurance

policy, no adjustment was made for the amount charged as premium for the annuity contract. Likewise, in computing the amount charged for the annuity, no adjustment was made for the single premium charged for the insurance policy. Both premiums were the actuarial equivalent of rates charged people of other ages (R. 14, 15). The company treated the two contracts separately and issued a separate receipt to the decedent for each. The company maintains certain reserves for insurance and annuities. The premium paid for the life insurance policy was credited to the insurance reserve and the premium paid for the annuity was credited to the annuity reserve (R. 14). The company is required to report to the State Commissioner of Insurance all insurance policies issued and cancelled, also all annuities issued and cancelled. The two contracts were so reported under the two groups, one under life insurance and the other under annuities (R. 14).

The decedent died on January 1, 1936. On her Estate Tax Return, Form 706, the insurance policy in question was listed, its value was returned at $25,000 but inasmuch as this was the only insurance carried by the decedent, it was reduced by virtue of the exemption to no value. The Commissioner determined that the proceeds of the life insurance policy were not received "as insurance" within the meaning of Section 302(g) of the Revenue Act of 1926 and consequently decedent's estate was not entitled to the $40,000 exemption provided by such section. He thereupon determined a deficiency of $3,875.29. The Board of Tax Appeals reversed this determination, holding that the proceeds of the life insurance policy were received "as insurance" and that the estate was therefore entitled to the exemption (R. 17). The Circuit Court of Appeals for the Second Circuit affirmed the decision of the Board (R. 40, 43).

Summary of Argument

I. The life insurance policy and the annuity were separate, distinct and complete contracts in substance and in form.

II. The fact that the decedent purchased a straight life annuity contract on the same date she purchased the life insurance policy does not affect the status of the latter as life insurance.

III. The instant case is clearly distinguishable from the "deposit arrangement" cases.

IV. The history of the statute indicates no intention on the part of Congress to restrict the exemption to proceeds of certain types of insurance contracts.

V. The contracts in question were entered into by the decedent neither in contemplation of death nor as a plan to evade or even avoid the payment of taxes.

VI. The plain language of the statute granting the exemption to life insurance proceeds should not be limited by implication to insurance issued under certain conditions.

Preliminary Remarks

The Petitioner states in his brief that the Board of Tax Appeals found as a matter of fact that the decedent was "uninsurable," further that the respondents concede that the decedent was "uninsurable" and that the insurance

company considered her "uninsurable." We think that the Petitioner is using the word "uninsurable" in a loose and misleading sense. Since the insurance company *did* issue the insurance policy in question to this decedent, since the Board found as a matter of fact and held as a matter of law that it *was* a life insurance policy, it is begging the question to say the Board found the decedent to be "uninsurable." Of course,, the Respondents *do not* concede that the decedent was uninsurable. By "uninsurable" the Petitioner evidently means that this decedent was not required to pass a physical examination or that she could not have obtained the policy here in question without the annuity, facts which the respondents do concede.

ARGUMENT

POINT I

The Life Insurance Policy and the Annuity Were Separate, Distinct and Complete Contracts in Substance and in Form.

The life insurance policy and the annuity here in question were separate, distinct and complete contracts. A separate application was signed by the decedent for each contract and a separate consideration paid therefor. Each contract was issued on the regular, standard form used by the company. Neither contract referred to the other directly or indirectly, either could have been assigned and the life insurance policy could have been surrendered without affecting the company's liability under the annuity. Going beyond the instruments themselves, we find that the issuing company regarded the transactions as separate and distinct

contracts and upon the issuance thereof they were so reported to the Commissioner of Insurance of the State of Connecticut, as required by law (R. 14, 32). Separate receipts were issued to the decedent by the company covering payment received by it for each contract (R. 14, 30, 31). The consideration, or premium, paid for each contract was computed on an actuarial basis and in accordance with the company's regular schedule of rates. In other words, in computing the single premium charged for the life insurance policy, no adjustment or allowance was made for the annuity premium and in computing the annuity premium, no adjustment or allowance was made for the insurance premium (R. 14, 31). The amount received by the company as a single premium for the insurance policy was credited to its insurance reserve and the amount received by it for the annuity, to its annuity reserve (R. 14, 32). All the legal incidents of ownership enjoyed by the owner of any ordinary life insurance policy were vested in the decedent with respect to the policy here in question and she could have exercised any or all of them without reference to the annuity contract (R. 11-13).

Contractual arrangements entered into at the same time may often be treated as one contract but that is not the case where the parties intend that they be deemed separate and independent contracts. *Williston,* Contracts, 2d Ed. Section 628. The obvious intention of the contracting parties here cannot be ignored. All the evidence points to an intention of the parties to enter into a life insurance and an annuity contract, separate, distinct and independent of each other.

Even where the contracting parties combine all their promises in one document instead of two or more, the cases

hold that if the agreement sets forth separate features, clearly severable, each feature must be given its proper application. *Equitable Life Assurance Society of United States* v. *Deem,* 91 F. (2d) 569, 575 (C. C. A. 4th); *Connecticut General Life Insurance Co.* v. *McClellan,* 94 F. (2d) 445, 446 (C. C. A. 6th); *Downey* v. *German Alliance Insurance Co.,* 252 F. 701, 703, 704 (C. C. A. 4th); *Legg* v. *St. John,* 296 U. S. 489, 490-495; *Bodine* v. *Commissioner,* 103 F. (2d) 982, 985 (C. C. A. 3d).

In *Legg* v. *St. John, supra,* the question before this Court was whether Legg, a voluntary bankrupt, or his trustee was the person entitled to certain future monthly disability benefits payable under a contract entered into between Legg and an insurance company before the adjudication. Several years prior to the adjudication Legg took out a life insurance policy under which the company agreed, in consideration for a stated premium, to pay a certain amount upon his death. By a supplementary contract issued on the same day and attached to the policy, the company, in consideration for an additional annual premium of a stated amount, agreed to pay a monthly benefit of $174.52 upon due proof of total and permanent disability, which latter event happened several years before the adjudication. In holding that the disability benefits were payable to the trustee and not to the bankrupt, Mr. Justice BRANDEIS in the course of his opinion said:

> "Second. The fact that the disability benefits are provided for in a 'Supplementary Contract' issued on the same day as the policy and physically attached thereto does not make them life insurance. The life policy and the contract were executed as distinct instruments. The 'Supplementary Contract' was to operate for some purposes as if a part

> of the life policy. But for all other purposes it is a separate obligation. The hazards covered by the two instruments are obviously different. The beneficiaries differ also. The payment under the life policy was to be made to the wife; the disability benefits are to be paid to Legg himself. A separate and different premium was exacted for the obligations assumed in each instrument. It was provided that forfeiture of the life policy would terminate all rights arising from disability; but the supplementary contract could be terminated by Legg without affecting otherwise his life policy."

In *Bodine* v. *Commissioner, supra,* insurance features and annuity features were contained in one contract but the Court, nevertheless, found that the contract was not only a contract of annuity but that it also possessed the characteristics of a single premium life insurance policy.

The Petitioner cites several cases (p. 22) supporting the proposition that a transaction may not be broken up into its component parts for tax purposes. Typical of such cases is *Pearson* v. *McGraw,* 308 U. S. 313. There the decedent was an Oregon resident. An Illinois trust company held his securities and remitted the income to him. Six months prior to his death he directed the trust company to sell his securities and to purchase Federal Reserve notes with the proceeds. When this was accomplished he transferred the notes by irrevocable trust to the trust company. Under the Oregon statute transfers of intangibles in contemplation of death are subject to the succession tax but the Supreme Court of Oregon held that since the intangibles in question had become tangibles and had acquired a business situs in Illinois, the Federal Constitution prohibited the tax. The decision was reversed by this Court. Mr.

Justice DOUGLAS, in delivering the opinion of the Court, said:

> "The mere sale of the intangibles and the acquisition of the Federal Reserve notes had no functional or business significance apart from the August 15, 1935, transfer (the establishment of the trust). That is emphasized here because they created no legal relations and gave rise to no vested rights interfering with decedent's continuing power of disposition."

It should be noted that in cases of such kind, the separate contract or component step which the taxpayer attempted to isolate had no meaning, no purpose, unless considered with the other contracts or component steps. The obvious purpose for attempting to separate the contracts or component steps in such cases was to evade taxes. The instant case is clearly distinguishable from cases of that sort. Here each contract had its normal, business purpose—each had its own functional significance. Furthermore, in contrast to cases of the type of *Pearson* v. *McGraw, supra*, it cannot be claimed here that the decedent entered into the separate insurance contract for the purpose of evading taxes (*infra*, p. 23).

Whatever these two contracts may be called and regardless of what other benefits were provided thereby, the sum of $25,000 which was paid to the beneficiary is the only sum here sought to be taxed. The beneficiary's right to receive such sum from the company was derived solely from the company's promise contained within the four corners of the contract designated as the life insurance policy and such right was dependent upon nothing else for its enforcement.

The Petitioner suggests (p. 17) that the parties may have accomplished the same result by calling in a scrivener

to draft a simple contract which would have provided merely for the transfer of $27,125 by the decedent to the company in return for its promise to pay her $589.80 annually during her life and upon her death to pay her daughter $25,000. We cannot assume, however, that the decedent would have been satisfied with such bare provisions. We cannot assume, for example, that she would have waived the incontestability clause or the rights reserved to her to change the beneficiary, to assign the policy, to borrow upon it, or to surrender it for its cash value. The scrivener would have had to be able to compute the table of cash or loan values, a very important item in any life insurance policy. If all these provisions were so included by the scrivener we would have the essential elements of a life insurance policy. The annuity provisions may have been added but since they impose entirely different obligations on the company, the recitation of a separate and distinct consideration would have been necessary. However, there is a very practical reason why the insurance company here would not have desired to execute one contract including both the insurance and the annuity features. Under Section 187 of the Tax Law of New York (Consolidated Laws of New York c. 60), a franchise tax is levied on insurance corporations based on the premiums received "on all policies, certificates, renewals, policies subsequently cancelled, insurance and re-insurance." In *People* v. *Knapp,* 193 App. Div. 413, 416, it was held that the tax imposed by such section does not apply to premiums paid for annuity contracts. Consequently, if the two contracts here in question had been consolidated into one, it would have been necessary for the company, after receiving payment, to allocate part of same to the insurance premium for calculation of the tax.

POINT II

The Fact That the Decedent Purchased a Straight Life Annuity Contract on the Same Date She Purchased the Life Insurance Policy Does Not Affect the Status of the Latter as Life Insurance.

Despite the distinguishing and severable features of the two contracts, the Petitioner contends that the life insurance policy lost its identity completely because of the issuance of the annuity—that the decedent received neither an insurance policy nor an annuity but instead, some sort of "investment contract" (Petitioner's brief, pp. 17-18).

In the first place, it should be noted that the Connecticut General Life Insurance Company has no power to issue "investment contracts." Under its charter, it is permitted to issue insurance contracts and annuities (R. 32-33). If the contractual arrangement between the parties here lacks the essential elements of life insurance as the Petitioner contends, then the company has issued an *ultra vires* contract. This should not be readily presumed.

Contracts executed as a condition precedent to, or in conjunction with, other contracts are commonplace in business transactions. A bond does not lose its identity because it is executed in conjunction with a mortgage. Preferred stock does not lose its identity because it is purchased in conjunction with common stock or as a condition precedent to the purchase of common stock. A health insurance policy does not lose its identity because the issuing company may require that an accident policy be taken out with it. If collateral in the form of a mortgage on real estate is found to be worthless because of a defective title, could it be argued that the holder of the bond issued in conjunction with the mortgage has no recourse thereon? With

respect to the issuance of the annuity as a condition precedent to the issuance of the life insurance policy here in question, we think that the Court below covered the point succinctly when it said (R. 42):

> "The fact that she could not have gotten that policy unless she had also bought an annuity contract *does not change the character of what she got.*" [Italics supplied.]

The petitioner completely ignores the severable features of the two contracts above described and speaks of "the transfer of $27,125 by the decedent to the company" in return for the company's agreement to pay decedent $589.80 annually and to pay her daughter $25,000 upon her death. It is immediately obvious why the Petitioner wishes to have these two contracts treated as one indivisible contract. Since the decedent's age and the fact that she was not required to take a physical examination are in no way material to the issues here involved, the Petitioner must seek other grounds on which to contend that the insurance policy here was not really life insurance. So he contends that because of the issuance of the annuity, the element of "insurance risk" was eliminated and that the two contracts thereby became one "investment contract."

We would hesitate to accept any definition of the oft-used term "insurance risk." To understand all of the risks involved in the complicated business of selling insurance at a profit would require a detailed study into the various ramifications of insurance underwriting. Where insurance risk leaves off and investment risk begins is also difficult to determine. For example, we know that the investment element is of minor consideration in the low premium term contract, whereas it becomes a very important factor in the costly single premium endowment contract. Mr. Joyce, the company's actuary, stated that the

annuity here may have reduced the risk but it did not eliminate it—it merely relieved the "underwriting problem as you normally think of it" (R. 33-34).

Regarding the two contracts as one transaction for the purpose of this line of argument, it is submitted that it *was* possible for the company to have sustained a loss on the business of writing these contracts and that such possibility existed when the contracts were issued. For example, if the decedent lived, and at the end of one year had surrendered the insurance policy for its cash surrender value, she would have received the sum of $19,550 (R. 13). Without attempting to compute exactly how much would then be left in the hands of the company from the total premiums paid to it on both contracts, it is apparent that the annual annuity payment of $589.80 would be more than the company could possibly earn on such remaining funds. Consequently, it is quite evident that within a few years the company would have to draw on its general funds in order to meet its obligations under the annuity. In other words, if the decedent had surrendered her life insurance policy at the end of the first year, *a loss or a gain to the company on the two contracts would depend almost entirely on how long the decedent lived thereafter.* The possibility of such a loss under such circumstances clearly existed at the time the two contracts were issued.[1]

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[1] The Petitioner anticipates this point in his brief (footnote p. 16) by attempting to show that although the risk of loss may have existed under such circumstances, it was remote. His calculations are inaccurate in that he makes no allowance for the expenses incurred by the company in issuing these contracts. The exact amount of such expenses or "loading charge" was not revealed by the evidence but such loading charge was, of course, incurred (R. 35).

The Petitioner further argues that such a risk of loss would spring from the annuity rather than from the insurance policy. His position is apparently inconsistent. For the purpose of showing a lack of insurance risk, it is necessary for him to treat the transaction as one contract and lump the two premiums together but for the purpose of minimizing the illustrated risk he would treat such risk as springing from the existence of the annuity.

Here is the crux of the matter. All insurance is a matter of balancing or averaging of risk. Over a given period the premium rates must be so calculated that the company is virtually assured of taking in more than it pays out. This balancing of risk can be accomplished in a variety of ways and the process of accomplishing it is often called "underwriting." The fact that in this case the company sought to underwrite the risk by different means than it ordinarily used in underwriting life insurance policies—*i. e.*, in a manner different than "you normally think of it" does not make the policy of life insurance issued to the decedent something other than life insurance. There is nothing in the exempting statute which requires that the insurance proceeds be receivable from a particular kind of life insurance contract, or that the policy in question be written in any particular way or conform to any particular standard, or that it be issued only after a physical examination of the insured, or that it be written according to any specific group of underwriting principles. The statute does not preclude the exemption on any of these grounds, and expresses no concern with any action the insurance company may take to relieve its underwriting problems or to minimize the risk in particular cases. If Congress had intended that the exemption should depend on conformity to a particular standard, it would have so provided. It did not. On the contrary, it used the broadest language in exempting amounts (not in excess of $40,000) "receivable * * * as insurance under policies taken out by the decedent upon his own life" (Appendix, *infra*, p. 28). The Treasury Regulations (*infra*, p. 33) are equally broad, stating "the term 'insurance' refers to life insurance of every description * * *."

From a standpoint of underwriting, the reason the insurance company here would not have issued the life in-

surance policy to the decedent without the annuity was not because of her advanced age, not because she did not pass a physical examination but because it would have been difficult to get a sufficient number of persons of her age to apply for similar policies and thus be brought into the broad average for underwriting purposes. In writing group insurance the company is able to waive a physical examination because of the existence of similar policies issued to persons subjected to similar employment risks. Aside from group insurance, if a sufficient number of persons could be brought into a particular class the company would not necessarily require a physical examination (R. 36, 37). Since it was impractical to sell insurance to a large class of the age of the decedent, the company accepted in lieu of a physical examination the issuance of the life annuity.

In Petitioner's brief (pp. 19-20) he states:

> "It follows that in every case where the aggregate amount paid for the annuity and insurance policies equals or exceeds the face amount of the insurance policy, and where the return on that amount to the insurance company equals or exceeds the annual annuity payments, there is no shifting of any risk of loss and consequently no element of insurance."

In other words the Petitioner contends that regardless of age or physical condition and regardless of whether or not the annuity is issued as a condition precedent to the issuance of the policy, if the two are issued in conjunction, no element of life insurance exists. Thus, the Petitioner would argue that if this decedent had been *fifty* years of age instead of *eighty* and had voluntarily purchased the annuity along with the policy, she would have received neither

a life insurance policy nor an annuity but would have received instead one "investment contract."

We do not think that insurance policies purchased simultaneously with annuities should be treated as "*inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise." There is no indication whatever that such was the intention of Congress in enacting Section 302(c) or Section 302(g). Nor, do we see how it can be seriously contended that the decisions of this Court in *Helvering* v. *Hallock*, 309 U. S. 106, and *Klein* v. *United States*, 283 U. S. 231 (Petitioner's brief, p. 25) are applicable to the insurance situation presented here.

The Petitioner argues further (p. 17) that the decedent had no insurance purpose in entering into these contracts—that it was only an investment purpose. What is the motive or purpose of life insurance? Apparently, the Petitioner feels that insurance taken out by a wealthy person who has already provided for his family is not life insurance. On page 20 of his brief, he states:

> "The purpose of the exemption was to encourage the institution of life insurance as 'the least costly and most equitable device yet evolved to preserve families in a wage-earning society from destitution'."*

This amounts to a contention that a life insurance contract in which savings or investment features are emphasized, or one which is effected primarily for investment purposes, such as providing a fund for the payment of taxes, is not life insurance. The contention is manifestly absurd. Most forms of life insurance provide some sort of cash value

* Matter in single quotation from opinion in *Commissioner* v. *Keller's Estate*, 113 F. (2d) 833, 835 (C. C. A. 3d), No. 371, present Term.

which is in itself an investment feature. Furthermore, it is common knowledge that life insurance is frequently purchased for investment purposes.

The contract in question presents the essential requisites of life insurance. For a stipulated consideration the company undertook to indemnify the beneficiary against loss by a specified contingency, peril or risk. That contingency was the death of the insured, this decedent. *And the death of the decedent was the sole contingency for the payment of the principal amount of the policy.* Clearly, therefore, the proceeds here sought to be taxed were the proceeds of a life insurance contract. The fact that an annuity contract imposing entirely different obligations on the company was issued at the same time does not make the life insurance contract something other than life insurance.

POINT III

The Instant Case Is Clearly Distinguishable From the "Deposit Arrangement" Cases.

The Petitioner contends (footnote p. 11) that the decision of the Court below is in substantial conflict with *Old Colony Trust Company* v. *Commissioner*, 102 F. (2d) 380 (C. C. A. 1st). This case involves one of the so-called "deposit arrangement" situations. In such cases the "insured" is given the right to withdraw the entire principal amount of the "policy" at any time. In the *Old Colony* case, for example, the entire agreement between the decedent and the insurance company was contained in a single contract. The term "life insurance" was not mentioned. In fact, the contract was designated on its face "Life

Annuity With Principal Sum Payable At Death." The consideration paid by the decedent for such contract was $42,000, the face amount of which was $40,000. The annuity payable to the decedent was computed on the basis of 3½% on the principal amount and such principal amount was payable either to the beneficiaries named in the contract, or to the decedent upon demand. It was held that the proceeds were not entitled to the exemption provided for life insurance proceeds under Section 302(g). In *State ex rel. Thornton* v. *Probate Court,* 186 Minn. 351, also cited by Petitioner (footnote p. 11) a similar situation prevailed. There the decedent deposited $30,000 with each of three insurance companies. Each company agreed to pay him approximately 3% annually of such amount and to allow him a participation in the earnings of the company. *But in each contract the decedent was given the right to withdraw the entire principal amount of $30,000 at any time.* In holding that the contracts were not life insurance policies the Court observed that the funds in question were subject to the same use, disposal and control by the decedent as if he had deposited them in a bank under a similar contract.

In the instant case, the decedent could not have withdrawn the face amount of the life insurance policy, $25,000, under any circumstances. *Her death was the sole contingency for the payment of such amount.* During her life all she could get under the insurance policy was its cash surrender or loan value as in the case of any ordinary life insurance policy. Furthermore, in the instant case, the monthly payments promised to the decedent bore no resemblance to interest. If she had surrendered the life insurance contract as she had a right to do, the company still would have been obligated to pay her an income of $49.15

per month under the terms of the annuity contract. These payments certainly could not then be regarded as interest on the total consideration paid, because the greater portion of that would have been disbursed as a cash surrender value. To so regard them would result in an "interest rate" far in excess of what the company could earn on the funds then in its hands. Clearly, therefore, the monthly payments promised to the decedent were not interest but true annuity payments.

There is no quarrel here with the decisions reached in the *Old Colony Trust Company* and *Thornton* cases, *supra,* and other cases involving a mere "deposit arrangement." *In none of those cases was death the sole contingency for the payment of the principal amount.* That death *was* the sole contingency for such payment here is undisputed.

POINT IV

The History of the Statute Indicates No Intention on the Part of Congress to Restrict the Exemption to Proceeds of Certain Types of Insurance Contracts.

Since the Petitioner has dwelt considerably on the purpose of the exemption accorded to life insurance proceeds and the intention of Congress with respect thereto, it may be well to examine briefly the history of the exempting statute. Prior to the Revenue Act of 1918, there was no statutory provision for the taxation of life insurance proceeds. Until such time proceeds payable to the executor of an estate were considered subject to estate taxes within the meaning of Section 202(a) of the Revenue Act of 1916 (39 Stat. 777). This Section contained a qualifying

clause to the effect that the property to be included in the gross estate must be subject to the payment of charges against the estate, to the payment of expenses of administration and to distribution as part of the estate. By the enactment of Section 402(f) of the Revenue Act of 1918 (40 Stat. 1098) Congress specifically provided that insurance receivable by the executor and also to the extent of the excess over $40,000 of the amount receivable as insurance by all other beneficiaries should be included in the gross estate of the decedent. The language used in that section has not been changed. In the report of the Ways and Means Committee on this bill (House Report 767, 65th Congress, 2d Session), which bill later became the Revenue Act of 1918, the Committee said at page 22:

> "The gross estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within Sec. 202(a) of the existing statute and this construction of the existing statute is now written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to the specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for the expenses of administra-

> tion or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum."

An identical statement is contained in report No. 617 of the Senate Finance Committee, 65th Congress, 3rd Session, page 42.

It is apparent from an examination of the above reports that Congress had no intention of denying the exemption to proceeds of life insurance contracts taken out primarily for investment purposes. On the other hand, it was plainly the intention of Congress to permit persons of wealth to take advantage of the exemption as well as wage-earners. In other words the exemption was enacted with the full knowledge that it *might* be utilized by *any* person to whom it was available. Furthermore, there is no indication in the above reports that Congress intended the exemption to apply to particular types of insurance or to insurance issued under certain conditions.

POINT V.

The Contracts in Question Were Entered Into by the Decedent Neither in Contemplation of Death Nor as a Plan to Evade or Even Avoid the Payment of Taxes.

The Board of Tax Appeals found as a matter of fact and held as a matter of law that the proceeds here in question were received by the beneficiary "as insurance" within the meaning of the exempting statute. Consequently, there was no need for the Board to find as a matter of fact that the contracts in question were not entered into by the decedent in contemplation of death. However, it did so find (R. 16). Such finding was supported by substantial evidence and should not be disturbed on review. *Colorado National Bank* v. *Commissioner,* 305 U. S. 23, 27; *Helvering* v. *Rankin,* 295 U. S. 123, 131.

The record clearly indicates the primary purpose of the decedent in purchasing this insurance (R. 27, 29). In 1935, she had certain securities which were then worth approximately $25,000. A few years prior thereto, these securities had been worth about $100 000 (R. 27). As the income from such securities was very small, she decided to prevent further shrinkage in this particular part of her estate by selling the securities and investing the proceeds in these contracts. Naturally, "the estate tax situation came up" (R. 29) but the evidence is clear and the Board of Tax Appeals so found that such was not a primary consideration. Such finding should not be disturbed. *Colorado National Bank* v. *Commissioner, supra; Helvering* v. *Rankin, supra.* Even if decedent's primary motive in purchasing the insurance had been to reduce her gross estate, such would not make the

transaction a tax evasion scheme or "device." Congress specifically permitted such avoidance of taxes, if such it be, by granting the exemption to life insurance proceeds. As the Court below said (R. 42):

> "There is no suggestion in the statute that the exemption is to be denied if the insured's motive in buying the insurance is to reduce the gross estate he may leave at death."

We submit that the purchase of a single premium life insurance policy is not a "transfer" within the meaning of any of the provisions of Section 302(c) of the Revenue Act of 1926. If such is true we do not believe that the proceeds of the single premium life insurance policy here in question should be deprived of the exemption provided by Section 302(g) merely because a separate, distinct and completely different contract was issued by the company as a condition precedent to the issuance of the policy.

POINT VI

The Plain Language of the Statute Granting the Exemption to Life Insurance Proceeds Should Not Be Limited by Implication to Insurance Issued Under Certain Conditions.

This Court has repeatedly stated that in the operation of tax statutes, burdens should not be imposed upon taxpayers beyond what the statutes expressly and clearly provide. *Gould* v. *Gould,* 245 U. S. 151, 153; *United States* v. *Merriam,* 263 U. S. 179, 187-188; *Burnet* v. *Niagara Brewing Co.,* 282 U. S. 648, 654.

In *Gould* v. *Gould, supra,* Mr. Justice McReynolds, delivering the opinion of this Court, said at page 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication, beyond the clear import of the language used, *or to enlarge their operations so as to embrace matters not specifically pointed out.* In case of doubt they are construed most strongly against the government, and in favor of the citizen." (Italics supplied.)

In *U. S.* v. *Merriam, supra,* Mr. Justice SUTHERLAND, in delivering the opinion of this Court, said at pages 187-188:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

Despite the Petitioner's theories as to the measure of "insurance risk" in certain cases and the "economic function" of insurance, the sole question remains: Is the estate tax exemption granted to insurance by Section 302(g) to be denied to the proceeds of a standard form life insurance policy *merely because a separate annuity contract was issued as a condition precedent to the issuance of the policy?* To so deny the exemption would be to read into the statute a condition which does not there exist. If it is deemed necessary or expedient to limit the exemption to proceeds of particular types of insurance or to insurance issued under certain conditions, that should be done by Congressional

amendment. Until such time, taxpayers, *the wealthy as well as the wage-earners,* should be entitled to rely upon the plain and unequivocal wording of the statute.

CONCLUSION

The decision of the Court below should be affirmed.

Respectfully submitted,

FREDERICK O. MCKENZIE,
Attorney for Respondents.

CHARLES PRATT HEALY,
Of Counsel.

December 10, 1940.

APPENDIX

Statute and Regulations Involved

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 803(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and by Sections 401 and 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States——
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of

a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

(d) (1) To the exent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

* * * * * * *

(g) To the exent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * * * *

[U. S. C., Title 26, Sec. 411.]

Treasury Regulations 80 (1937 ed.):

ART. 13. PROPERTY OF DECEDENT AT TIME OF DEATH.—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

* * * * * * *

ART. 18. TRANSFERS WITH POSSESSION OR ENJOYMENT RETAINED.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation or retention by the decedent of the use, or the possession, or the rents or other income or enjoyment of the transferred property, or any part thereof, for his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence his intention that it should extend at least for the duration of his life; including also the reservation or retention of the use, possession, rents, or other income the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate. (See article 15.)

If for any such period the use, possession, rents, or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents, or other income will be treated as having been reserved to or retained by the decedent.

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m. eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.

ART. 19. TRANSFERS WITH RIGHT RETAINED TO DESIGNATE WHO SHALL POSSESS OR ENJOY.—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, by trust or otherwise, in connection with which the decedent reserved or retained, either to himself alone or in conjunction with any other person or persons, the right during his life, or for a period not ascertainable without reference to his death, or for such a period as to evidence an intention that the right should continue for at least the duration of his life, to designate the person or persons who should possess or enjoy the transferred property (in whole or in part), or any of the income thereof. (See article 15.)

(b) *Taxability.*—If the transfer was not a bona fide sale for an adequate and full consideration in money or money's worth, the property or the interest or interests therein so transferred shall be included in the gross estate if falling within any one of the following paragraphs:

* * * * * * *

(3) When the transfer was made and decedent died after the enactment of the Revenue Act of 1932 (5 p. m. eastern standard time, June 6, 1932) and the right to so designate was reserved at the time of the transfer, whether exercisable by decedent alone or in conjunction with a person or persons having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

As used in this article, the expression "reserved at the time of the transfer" includes any understanding, expressed or implied, had in connection with the making of the transfer that the right to designate the person or persons who should possess or enjoy

the property or the income therefrom should later be created or conferred.

ART. 20. TRANSFERS WITH POWER TO CHANGE THE ENJOYMENT — (a) *Transfers included.*—Subdivision (d) of section 302 of the Revenue Act of 1926, as amended, embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See article 15.)

* * * * * * *

(b) *Taxability.*—The property or the interest or interests therein so transferred shall be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amend-

ment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the decedent's death occurred at any time subsequent to the transfer, and the power was reserved at the time of the transfer and was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * * * *

As used in this and in the next succeeding article, the expression "reserved at the time of the transfer" refers to a power which, having been reserved when the transfer was made, continued to the date of decedent's death (see the paragraph next following as to the conditions under which the power will be considered as existent at decedent's death) to be exercisable by decedent alone or by him in conjunction with some other person or persons, and includes any understanding, expressed or implied, had in connection with the making of the transfer that the power should later be created or conferred.

The power to alter, amend, revoke, or terminate will be considered to have existed on the date of the decedent's death, though the exercise of the power was subject to a precedent giving of notice, or though the alteration, amendment, revocation, or termination would take effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice had been given or the power had been exercised, or though the exercise of the power was restricted to a particular time or the happening of a particular event which had not arrived or occurred at decedent's death. When determining the value of the gross estate in such cases the full value of the

property transferred subject to the power should be discounted for the period required to elapse between the date of decedent's death and the date upon which the alteration, amendment, revocation, or termination could take effect. (See article 10 (i) (3).)

* * * * * * *

ART. 25. TAXABLE INSURANCE.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to have been taken out by the decedent, whether or not he made the application, if he acquired the ownership of, or any legal incident thereof in, the policy; but in the case of a decedent dying before November 7, 1934 (the date of approval of the 1934 edition of Regulatons 80), the provisions of the second paragraph of article 25 of Regulations 70 (1929 edition) will continue to apply. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

* * * * * * *

ART. 27. INSURANCE RECEIVABLE BY OTHER BENEFICIARIES.—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, re-

gardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in the appropriate schedule of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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SUPREME COURT OF THE UNITED STATES.

No. 237.—October Term, 1940.

Guy T. Helvering, Petitioner, *vs.* Edyth Le Gierse and Bankers Trust Co., Respondents. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

Less than a month before her death in 1936, decedent, at the age of 80, executed two contracts with the Connecticut General Life Insurance Co. One was an annuity contract in standard form entitling decedent to annual payments of $589.80 as long as she lived. The consideration stated for this contract was $4,179. The other contract was called a "Single Premium Life Policy—Non Participating" and provided for a payment of $25,000 to decedent's daughter, respondent Le Gierse, at decedent's death. The premium specified was $22,946. Decedent paid the total consideration, $27,125, at the time the contracts were executed. She was not required to pass a physical examination or to answer the questions a woman applicant normally must answer.

The "insurance" policy would not have been issued without the annuity contract, but in all formal respects the two were treated as distinct transactions. Neither contract referred to the other. Independent applications were filed for each. Neither premium was computed with reference to the other. Premium payments were reported separately and entered in different accounts on the company's books. Separate reserves were maintained for insurance and annuities. Each contract was in standard form. The "insurance" policy contained the usual provisions for surrender, assignment, optional modes of settlement, etc.

Upon decedent's death, the face value of the "insurance" contract became payable to respondent Le Gierse, the beneficiary. Thereafter, a federal estate tax return was filed which excluded from decedent's gross estate the proceeds of the "insurance"

policy. The Commissioner notified respondents Bankers Trust Co. and Le Gierse, as executors of decedent's estate, that he proposed to include the proceeds of this policy in the gross estate and to assess a deficiency. Suit in the Board of Tax Appeals followed, and the Commissioner's action was reversed. 39 B. T. A. 1134. The Circuit Court of Appeals affirmed. 110 F. (2d) 734. We brought the case here because of conflict with *Commissioner v. Keller,* 113 F. (2d) 833, and *Helvering* v. *Tyler,* 111 F. (2d) 422. 311 U. S. —.

The ultimate question is whether the "insurance" proceeds may be included in decedent's gross estate.

Section 302 of the Revenue Act of 1926 (44 Stat. 9, 70; as amended, 47 Stat. 169, 279; 48 Stat. 680, 752) provides: "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible . . . —(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40 000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." Thus the basic question is whether the amounts received here are amounts "receivable as insurance" within the meaning of § 302(g).

Conventional aids to construction are of little assistance here. Section 302(g) first appeared in identical language in the Revenue Act of 1918 as § 402(f). 40 Stat. 1057, 1098. It has never been changed.[1] None of the acts has ever defined "insurance". Treasury Regulations, interpreting the original provision, stated simply: "The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system." Treasury Regulations No. 37, 1921 edition, p. 23. This statement has never been amplified.[2] The committee report accompanying the Revenue Act of 1918 merely noted that the provision taxing insurance receiv-

[1] Act of 1921: 42 Stat. 227, 279; Act of 1924: 43 Stat. 253, 305; Act of 1926: 44 Stat. 9, 71; Code of 1939: 53 Stat. 1, 122.

[2] Regulations No. 63, p. 26; Regulations No. 68, p. 31; Regulations No. 70, 1926 edition, p. 30; Regulations No. 70, 1929 edition, p. 33; Regulations No. 80, p. 62.

able by the executor clarified existing law, and that the provision taxing insurance in excess of $40,000 receivable by specific beneficiaries was inserted to prevent tax evasion. House Report No. 767, 65th Cong., 2d Sess., p. 22.[3] Subsequent committee reports do not mention § 302(g). Transcripts of committee hearings in 1918 and since are equally unimformative.[4]

Necessarily, then, the language and the apparent purpose of § 302(g) are virtually the only bases for determining what Congress intended to bring within the scope of the phrase "receivable as insurance". In fact, in using the term "insurance" Congress has identified the characteristic that determines what transactions are entitled to the partial exemption of § 302(g).

We think the fair import of subsection (g) is that the amounts must be received as the result of a transaction which involved an actual "insurance risk" at the time the transaction was executed. Historically and commonly insurance involves risk-shifting and risk-distributing. That life insurance is desirable from an economic and social standpoint as a device to shift and distribute risk of loss from premature death is unquestionable. That these elements of risk-shifting and risk-distributing are essential to a life insurance contract is agreed by courts and commentators. See for example: *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139; *In re Walsh*, 19 F. Supp. 567; *Guaranty Trust Co.* v. *Commissioner*, 16 B. T. A. 314; *Ackerman* v. *Commissioner*, 15 B. T. A. 635; Couch, Cyclopedia of Insurance, Vol. I, § 61; Vance, Insurance, §§ 1-3; Cooley, Briefs on Insurance, 2d edition, Vol. I, p. 114; Huebner, Life Insurance, Ch. 1. Accordingly, it is logical to assume that when Congress used the words "receivable as insur-

[3] " . . . [Insurance payable to specific beneficiaries does] not fall within the existing provisions defining gross estate. It has been brought to the attention of the committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum." *Id.*, p. 22.

The same comment appears in Senate Report No. 617, 65th Cong., 3d Sess., p. 42.

[4] The curious consistency and inadequacy of section 302(g) have not escaped notice. See Paul, Life Insurance and The Federal Estate Tax, 52 Har. L. Rev. 1037; Paul, Studies in Federal Taxation, 3d Series, p. 351; United States Trust Co. *v.* Sears, 29 F. Supp. 643, 650.

ance'' in § 302(g), it contemplated amounts received pursuant to a transaction possessing these features. *Commissioner* v. *Keller, supra; Helvering* v. *Tyler, supra; Old Colony Trust Co.* v. *Commissioner,* 102 F. (2d) 380; *Ackerman* v. *Commissioner, supra.*

Analysis of the apparent purpose of the partial exemption granted in § 302(g) strengthens the assumption that Congress used the word ''insurance'' in its commonly accepted sense. Implicit in this provision is acknowledgement of the fact that usually insurance payable to specific beneficiaries is designed to shift to a group of individuals the risk of premature death of the one upon whom the beneficiaries are dependent for support. Indeed, the pith of the exemption is particular protection of contracts and their proceeds intended to guard against just such a risk. See *Commissioner* v. *Keller, supra; United States Trust Co.* v. *Sears,* 29 F. Supp. 643; Hughes, Federal Death Tax, p. 91; Comment, 38 Mich. L. Rev. 526, 528; compare *Chase National Bank* v. *United States,* 28 F. Supp. 947; *In re Walsh, supra; Moskowitz* v. *Davis,* 68 F. (2d) 818. Hence, the next question is whether the transaction in suit in fact involved an ''insurance risk'' as outlined above.

We cannot find such an insurance risk in the contracts between decedent and the insurance company.

The two contracts must be considered together. To say they are distinct transactions is to ignore actuality, for it is conceded on all sides and was found as a fact by the Board of Tax Appeals that the ''insurance'' policy would not have been issued without the annuity contract. Failure, even studious failure, in one contract to refer to the other cannot be controlling. Moreover, authority for such consideration is not wanting, however unrealistic the distinction between form and substance may be. *Commissioner* v. *Keller, supra; Helvering* v. *Tyler, supra.* See Williston, Contracts, Vol. III, § 628; Paul, Studies in Federal Taxation, 2d series, p. 218; compare *Pearson* v. *McGraw,* 308 U. S. 313.[5]

Considered together, the contracts wholly fail to spell out any element of insurance risk. It is true that the ''insurance'' contract looks like an insurance policy, contains all the usual provisions of

[5] Legg *v.* St. John, 296 U. S. 489, is not to the contrary. There nothing indicated that the one contract would not have been issued without the other; there was no necessary connection between the two.

one, and could have been assigned or surrendered without the annuity. Certainly the mere presence of the customary provisions does not create risk, and the fact that the policy could have been assigned is immaterial since no matter who held the policy and the annuity, the two contracts, relating to the life of the one to whom they were originally isued, still counteracted each other. It may well be true that if enough people of decedent's age wanted such a policy it would be issued without the annuity, or that if the instant policy had been surrendered a risk would have arisen. In either event the essential relation between the two parties would be different from what it is here. The fact remains that annuity and insurance are opposites; in this combination the one neutralizes the risk customarily inherent in the other. From the company's viewpoint, insurance looks to longevity, annuity to transiency. See *Commissioner* v. *Keller, supra; Helvering* v. *Tyler, supra; Old Colony Trust Co.* v. *Commissioner, supra; Carroll* v. *Equitable Life Assur. Soc.*, 9 F. Supp. 223; Note, 49 Yale L. J. 946; Cohen, Annuities and Transfer Taxes, 7 Kan. B. A. J. 139.

Here the total consideration was prepaid and exceeded the face value of the "insurance" policy. The excess financed loading and other incidental charges. Any risk that the prepayment would earn less than the amount paid to respondent as an annuity was an investment risk similar to the risk assumed by a bank; it was not an insurance risk as explained above. It follows that the sums payable to a specific beneficiary here are not within the scope of § 302(g). The only remaining question is whether they are taxable.

We hold that they are taxable under § 302(c) of the Revenue Act of 1926, as amended, as a transfer to take effect in possession or enjoyment at or after death. See *Helvering* v. *Tyler supra; Old Colony Trust Co.* v. *Commissioner, supra; Kernochan* v. *United States*, 29 F. Supp. 860; *Guaranty Trust Co.* v. *Commissioner, supra;* compare, *Gaither* v. *Miles*, 268 Fed. 692; Comment, 38 Mich. L. Rev. 526; Comment, 32 Ill. L. Rev. 223.

The judgment of the Circuit Court of Appeals is reversed.

The CHIEF Justice and Mr. Justice ROBERTS think the judgment should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals.